LAW REFORM
COMMISSION
OF
NOVA SCOTIA

Court-ordered Structured Settlements for Personal Injury Damage Awards

Background Paper, August 2004

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FOREWORD

This Background Paper is being issued for information purposes. It is not an exhaustive or comprehensive treatment of any aspect of the subject of structured settlements. It is the Commission's belief, however, that some of the information gathered in the preliminary stages of this project may be of some interest and use to the Bench, the Bar and the public. The Background Paper represents, in a sense, part of an unfinished discussion. The unique circumstances, however, surrounding the genesis and brief history of this project suggested to the Commission that sharing of the Commission's work, albeit incomplete, is merited.

I. INTRODUCTION

The Commission began work on this project in late 2002. Research was completed, and a background document was prepared. Consistent with its regular approach to projects, the Commission formed an Advisory Group, to help identify issues relating to court-imposed structured settlements. The Group comprised practicing lawyers, a Dalhousie University law professor, the province's Chief Worker Adviser, and the Executive Director of the Canadian Paraplegic Association (Nova Scotia). The Advisory Group first met in April 2003. Further to those discussions, the Commission completed additional research and prepared a draft Issues Memorandum. It was understood that Advisory Group members would meet in the fall of 2003, to discuss the Issues Memorandum.

Concurrently, to help generate interest in this project, the Commission ensured that its work on this project was widely publicized. Reference to this undertaking was added to the Commission's website. The Commission's Twelfth Annual Report, which was widely distributed in the Spring of 2003, reported that the Commission expected to publish a Discussion Paper on this topic in the summer of 2003. In June 2003, both *InForum* (Nova Scotia Barristers' Society) and *Ad Hoc* (Canadian Bar Association-Nova Scotia) advised readers that the Commission was involved in a project on structured settlements.

The Commission held its second Advisory Group meeting on this topic on October 1, 2003. At that meeting, members provided their comments on the draft Issues Memorandum. Members who were not able to attend the meeting in person submitted their comments in writing. It was noted that during the week prior to that second meeting, the Nova Scotia government had introduced Bill 1 (*An Act to Amend the Laws Respecting Automobile Insurance*) in the Legislature. Despite the legislation's title, it did not entirely involve automobile insurance. Rather, the Bill included a virtually complete word-for-word adoption of Manitoba legislative provisions involving structured settlements. Following changes to clauses of the legislation which did not concern structured settlements, it was enacted on October 27th, 2003 and received Royal Assent on October 30th.

Public discussion of Bill 1 had almost exclusively involved its implications for automobile insurance coverage and rates. For example, during debates in the House of Assembly, no reference was made to the merits of the structured settlements section. The Commission is not aware of any detailed media discussion relating to the new structured settlements provision. Commission staff examined all written submissions which were made to the Legislature's Law Amendments Committee and which were maintained on file at the Legislative Library. Of 59 written submissions, only two referred to structured settlements, and those comments were quite brief. In its submission of October 17, 2003, the Canadian Bar Association-Nova Scotia Branch (CBA-NS) indicated its support for structured settlements, which CBA-NS had identified as a potential reform topic in the mid-1990s. The second written submission which mentioned structured settlements was a memorandum prepared on behalf of the Co-operators General Insurance Company. That memorandum applauded the introduction of structured settlements, which were deemed "...an ideal mechanism to replace a stream of income since the amount received by the claimant is the same over time and savings are generated for the insurer." The memorandum went on to caution that the language in the proposed legislation needed to be made

"considerably stronger": "Specifically, structured settlements should be used unless it can be demonstrated by the plaintiff that it is inappropriate to do so. Without stronger language, the option will, regrettably, rarely be used."

Ordinarily, the Commission would take into account comments received from Advisory Group Members on an Issues Memorandum and would then prepare a Discussion Paper, to be given widespread distribution. Upon learning of the passage of Bill 1, however, the Commission questioned whether continuing with the project on structured settlements, so soon after the introduction of new legislation on this topic, would be the best use of the Commission's resources. As the Government would likely not be amenable to consider any changes to legislation of so recent a nature, it might be seen as premature to continue with an examination of structured settlements. The Commission concluded, however, that it could still be useful to publish a Paper setting out some of the information gathered during the course of this project. The Paper could serve an important informational role, that of providing essential details about the concept of structured settlements and the kind of circumstances in which they may appropriately be used. This information may be of assistance to those considering the use of a structured settlement: lawyers, injured plaintiffs and judges. The Commission therefore decided to continue with this project by publishing the background information in this paper.

The topic:

Structured settlements can arise in personal injury cases where damages are awarded. A structured settlement is very simply a method of paying a claimant their damages in whole or in part by means of periodic payments rather than a one-time lump sum payment.

This Paper is concerned with the relatively narrow question of in what circumstances should the Courts in Nova Scotia exercise a power to order a structured settlement. Should the Courts, for example, be able to impose a structured settlement on an unwilling party?

Until very recently in Nova Scotia, the Courts did not even have the jurisdiction to order a structured settlement for parties who willingly consent to such a settlement. The parties were of course free to negotiate such an arrangement and often did agree to a structured settlement.

Several other jurisdictions in Canada currently provide for court-ordered structured settlements, namely British Columbia, Manitoba and Ontario. This is discussed in further detail below.

Origins of this project:

The question of whether or not Nova Scotia Courts should be empowered to order structured settlements when awarding damages in personal injury cases had been a subject of active discussion in recent years. The pressure for providing such jurisdiction to the Courts appears to have come largely from the judiciary and the defendants' or insurance Bar.

Some years ago it was suggested to the Commission by members of the judiciary that the compensation system for personal injury damage awards might be an appropriate subject for legislative reform. It is also noteworthy that a cover article of 21 years ago in the Nova Scotia Law News applauded structured settlements as a flexible alternative.

More recently, in the fall of 2002, the subject was debated at the meeting of the Legislation and Law Reform Committee, CBA-NS. The subject had also been considered by the Administration of Justice Committee of the Nova Scotia Barristers' Society. The Committee recommended to the Society's Bar Council the adoption of a resolution in support of court-ordered structured settlements. That recommendation was defeated at Bar Council. A motion, however, was approved whereby: "Council agrees in principle that the Court should have the authority necessary to order a structured settlement of any damages where both parties agree, including after a decision is made". It was subsequently suggested that the Law Reform Commission of Nova Scotia should undertake a project on this subject. The Commission concluded that the proposed project contained a sufficiently important public interest component to merit being undertaken.

Definitions:

This Paper attempts to present legal and technical information as clearly as possible. As some of the language relates to specific legal or technical concepts, the words used may not be familiar to everyone. This section provides definitions and explanatory notes where such words are used in this Paper.

Act	Law made by elected members of government. Also referred to as 'statute' or 'legislation'.
Annuity	A yearly payment of a certain sum of money. This includes an amount payable on a periodic, usually monthly, basis. Annuities are purchased from insurance companies to fund the periodic payments under a structured settlement.
Common law	The law contained in court decisions rather than in legislation.
Cost of future care	The amount of money required to meet an injured party's long term future care needs. The capital sum required to produce a stream of income will depend on the number and nature of assessed needs, the injured person's life expectancy and whether the income is to be generated by investing a lump-sum or purchasing an annuity through a structured settlement in order to produce periodic monthly payments.
Damages	Sum of money, awarded by a court to compensate a person for loss or harm resulting from the wrong of another person.

Defendant	The person against whom a plaintiff's claim is made.
Guarantee period	A time period during which payments will be made regardless of whether the recipient is alive or not. It is designed to provide benefits to the family or estate of an injured party.
Impairment ratings	These are obtained from life insurers based on an individual's existing medical reports. Such ratings provide more favourable lifetime quotations for the purchase of an annuity to fund a structured settlement, with the result that the recipient receives more monthly income.
Income Tax Gross up	An amount awarded by the Courts to offset the income tax payable on investment income generated by the lump sum for future care costs. The objective is to ensure that the injured party will have sufficient after tax income to meet future care costs.
Indexing	In order to adjust for inflation, a means of ensuring that income will increase each year by a fixed amount such as 2% or 3% per year compounded or at a rate equal to the increase in Statistics Canada's Consumer Price Index.
Legislation	Law made by elected members of Government. Also referred to as 'act' or 'statute'.
Life expectancy	The average age to which it is estimated that a person of a certain sex and age will live, based upon actuarial tables.
Lump sum	Usually a once and for all time single capital payment of a personal injury damages award.
Management fees	Fees associated with the costs of managing the investment of a lump sum.
Parties	The plaintiffs and defendants involved in a legal action.
Periodic payments	Regular recurring payments - often monthly.
Plaintiff	A person seeking to establish in the Courts a legal right to, for example, damages for a personal injury.
Present value	In assessing damages for future care, courts calculate a capital amount - the "present value" lump-sum - that is adjusted for investment-

	caused appreciation and inflation - caused depreciation. Generally, over the long term, investment will appreciate a capital award more than inflation will depreciate its value. The Courts, therefore, apply a "discount rate" to the assessed award to reflect the difference between the investment generated increase in value of the award offset by the extent to which it is reduced in value by inflation.
Statute	Law made by elected members of Government. Also referred to as 'act' or 'legislation'.
Structured settlement	A means of paying a claimant their damages in whole or in part through periodic payments (usually monthly), rather than a one-time lump-sum payment. Such periodic payments are funded by the purchase of an annuity from an insurance company.

II. GENERAL DISCUSSION

At common law, a successful plaintiff in a personal injuries case has always been entitled to receive a once and for all lump-sum award.

Some 25 years ago, Justice Dickson, as he then was, lamented the lump-sum once and for all time award system in the case of ***Andrews* v. *Grand and Toy Alberta Limited***. In delivering the judgement of the Court he said:[1]

"The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.

The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgement new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs....

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the

[1] [1978] 2 S.C.R. 229 at 236-237.

postulates from which he proceeds. Although a useful aid, and a sharper tool than the "multiplier-multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer."

Subsequently the Supreme Court of Canada reiterated in the case of ***Watkins* v. *Olafson***[2] that in the absence of enabling legislation, a Court should not override a plaintiff's entitlement to receive his future care award as a lump-sum payment in accordance with long-established common law practice.

Structured settlements have been in existence for a number of years. They are currently used in Europe, the United Kingdom, Australia, the United States, and several jurisdictions in Canada.

Structured settlements can be structured in a great variety of ways which are designed to meet the specific needs of the injured plaintiff. It may be instructive to briefly outline below some of the salient features of lump-sum settlements and by contrast those of structured settlements.

A lump-sum settlement

A lump-sum settlement is a one-time cash award designed to compensate an injured plaintiff for pain and suffering, and for past and future financial losses. A lump-sum award has great flexibility inasmuch as the recipient of this payment is free to invest it as he or she wishes in order to produce the required income. Furthermore, the recipient may choose to apply all or part of the capital sum to the acquisition of assets such as a house, car or the payment of outstanding debts. Because the compensation is for personal injuries, it is not considered by the Canada Customs and Revenue Agency (CCRA) to be taxable. The recipient must, however, pay tax on any income received from the monies once they are invested.

The payment of a lump-sum award is the traditional means at common law of satisfying the claims of a personal injury plaintiff. Once the payment is made, there is no longer any continuing relationship between the plaintiff victim and the defendant and its insurer.

[2] [1989] 2 S.C.R. 750

A structured settlement

A structured settlement results in guaranteed periodic payments (usually monthly) for the life of the recipient. The defendant's insurer purchases an annuity from a Canadian life insurance company which then guarantees to provide the plaintiff with periodic payments for a specified period. A structured settlement can take a great variety of forms designed to best fit the particular needs of the recipient, including periodic lump-sum amounts to meet anticipated future capital expenditures for such items as new wheelchairs or vehicles. All of these payments are received tax free.

How do structured settlements work?

As indicated above, structured settlements can take a great variety of forms and as a result provide considerable flexibility to the recipient. For example, the frequency and duration of payments, whether they start immediately or are deferred for some time in the future, whether they begin with a small amount and increase over time, and whether the recipient will receive periodic lump-sum amounts on specific dates of their choice are all matters which can be incorporated into the particular structure negotiated.

The structured settlement will not incur any investment management fees nor, as noted above, any income tax. Under a structured settlement it is possible to have a guaranteed tax-free lifetime income irrespective of fluctuations in the financial markets.

Structured settlements can also provide for inflation protection by incorporating a provision whereby the structured income will increase each year in accordance with the Consumer Price Index or for a fixed amount such as 2 or 3%, compounded.

Estate protection can be negotiated as part of the structured settlement, including a guarantee period which ensures a minimum number of years of income whether the recipient is alive or not. If the recipient dies before the guarantee period expires, their estate or heirs receive the remaining guaranteed payments entirely tax free.

Life expectancy affects the income which can be derived from a structured settlement which provides lifetime payments. There are many different health problems and injuries which can have an impact on life expectancy. If there are indications of reduced life expectancy an 'impairment rating' can be obtained from life insurers based on existing medical reports. An impairment rating simply means that the insurer treats the individual as being older than in fact is the case when providing a quotation for a lifetime structure. The effect of this is to increase the monthly income which a lifetime structure will generate. The individual thus receives more income over their contemplated "shorter" life.

PRINCIPAL FEATURES OF COURT-ORDERED STRUCTURED SETTLEMENTS:

Security

One of the most compelling reasons to use structured settlements is that they provide a known and guaranteed stream of payments for the lifetime of the recipient. The payments can be designed to cover not only future loss of income but also the cost of future care which can be very substantial. This consideration may be especially important in the case of a 'catastrophically injured' minor or incompetent person.

Capital invested in a structured settlement is creditor-proof. Further, structured settlements can provide for a minimum guarantee period in which payments will be made in the event of the premature death of the plaintiff.

Tax advantages

All payments received under a structured settlement, whether they be periodic monthly payments or occasional lump-sum payments or a combination of both, are entirely tax free. The plaintiff thereby receives a tax benefit as a result of a structured settlement. Similarly, the defendant avoids having to pay tax gross-up which can represent a significant portion of the overall damages awarded.

Cost savings

A structured settlement can potentially produce cost savings which benefit the defendant insurer. The capital required to fund the structured settlement is very often less than would be required to produce a similar stream of monthly payments through a lump-sum invested. Furthermore, under a structured settlement there is no requirement to gross-up for tax purposes which in itself can result in a substantial saving. The injured plaintiff can, however, use these potential savings to advantage when negotiating the terms of a structured settlement in order to obtain higher periodic payments than might otherwise be the case.

Additionally, to the extent that an injured plaintiff does not subsequently become a charge on the public purse as may happen if they outlive their life expectancy - this can be seen as cost saving to the public.

Flexibility

There is great flexibility in the design of structured settlements. The structured settlement may, for example, pertain only to the cost of future care with the plaintiff receiving a capital lump-sum with respect to the various other heads of damages. Furthermore, the structuring of the award for future cost of care can itself include the payment of periodic lump-sums to cover anticipated capital expenditures for such items as a new vehicle, wheelchairs, and like contingencies. Once, however, the various elements of the structure have been agreed upon and put in place, the structured

settlement can not be changed. This is in contrast to a lump-sum award which can be expended and invested in any manner and at any time that the plaintiff chooses.

Indexing

The structured settlement can be designed to reduce the effects of inflation by providing for an annual increase tied to either an increase in the Consumer Price Index (CPI) or a fixed rate of, for example, 2 or 3% per annum, compounded.

CONTRASTING FEATURES OF LUMP-SUM AWARDS:

Greater flexibility

Lump-sum awards can provide the plaintiff with the maximum of flexibility to invest or expend funds at any time in accordance with their own determination of their needs and best interests. Further, a lump-sum invested may well engage a better rate of return than would be the case with a structured settlement. An astute plaintiff or their investment advisor may, therefore, be able to do better financially with a lump-sum award in such circumstances.

Inherent risk

The calculation used to determine an appropriate lump-sum payment to fund future cost of care and lost income is based upon the injured plaintiff's life expectancy. The life expectancy represents simply an average which is to say that statistically, 50% of plaintiffs will live longer and 50% will die sooner than the assumed life expectancy. Those who do not reach their actuarially determined life expectancy will leave a windfall for their estate. Those who outlive their life expectancy are at great risk of being without funds or, having insufficient funds, to meet their cost of care and other financial requirements. In addition to the inherent risk relating to life expectancy, there is that associated with estimating future investment rates of return in order to generate the required income stream necessary to meet future cost of care and lost income.

Tax considerations

A lump sum award is entirely tax free. However, any income generated by the award when invested will be taxable by the recipient. Consequently there is an additional capital sum awarded by way of a tax gross-up to offset the tax liability incurred by the recipient as a result of investing their award for long-term future care costs.

Management fees

A lump sum award very often includes the additional cost of investment management fees in contrast to structured settlements which do not require such fees.

III. USE OF STRUCTURED SETTLEMENTS IN OTHER CANADIAN JURISDICTIONS

At present, parties may consent to a structured settlement and very often do so. The question arises, however, whether, and in what circumstances, if any, should the traditional common law right of a plaintiff victim to receive all of their damages at once, up front, be superceded by the right of a court to impose a structured settlement? More specifically, what criteria should be used to determine when a court-ordered structured settlement might be appropriate? It may be useful to briefly consider the legislation and case law in the several Canadian jurisdictions where there is provision for court-imposed structured settlements.

The three other jurisdictions in Canada which currently make legislative provision for court-ordered structured settlements are British Columbia, Manitoba and Ontario.

British Columbia

In British Columbia structured settlements are governed by s. 55 of the *Insurance (Motor Vehicle) Act*[3] in cases involving an award for pecuniary damages arising from a motor vehicle action. The legislation is mandatory and provides that:

> *The Court must order that an award for pecuniary damages in a motor vehicle action be paid periodically, on the terms the Court considers just.*

British Columbia legislation sets out the following two objective criteria either one of which can trigger the exercise of the Court's jurisdiction:

> 1) that the award for pecuniary damages be at least $100,000;
> 2) that the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award, i.e. an income tax gross-up. The legislation further provides by way of subjective criteria that the Court must find that a structured settlement is in the plaintiff's "best interests" or in the event that a tax gross-up is requested, that a structured settlement *"is not contrary to the best interests of the plaintiff."*

British Columbia legislation while mandatory provides a court with wide discretion hinged on the plaintiff's best interests. Further, the legislation provides that the court must not make such an order if it is satisfied that *"an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery for damages arising out of the accident."*

[3] R.S.B.C. 1996, c. 231; see: Appendix "A"

A review of reported British Columbia cases indicates that the B.C. Courts give considerable deference to the plaintiff's own assessment of his or her best interests. In ***Abraham* v. *Abbinante***[4] for example, the Court concluded that it would be contrary to the plaintiff's best interests to order that damages be paid periodically under s. 55(1) of the *Insurance (Motor Vehicle) Act*. The Court's decision may have been made somewhat easier by the fact that joint submissions were made by counsel, requesting the Court to award the plaintiff damages in a lump-sum. It was submitted by counsel that the plaintiff's interests required him to have unfettered flexibility to match his funds to his needs. The Court observed that the plaintiff's personal circumstances may fluctuate dramatically depending on future medical events and other contingencies of life may require funding on an uneven basis.

In ***O'Brien (Guardian ad litem of)* v. *Anderson***[5] the Court made an order for a structured settlement contrary to the wishes of the plaintiff. Justice Holmes noted in his decision that "*[t]he purpose of s. 55 is to guard against a plaintiff dissipating his award and becoming a charge on society*".[6] The plaintiff, although neither an incompetent nor a minor, had displayed a naivety and impulsiveness around the handling of money. Justice Holmes in reaching his decision discussed at some length the features of structured settlements and found as follows:[7]

"Prior to this application, the plaintiff did not put into force any plan of action that might demonstrate that he could formulate and adhere to an appropriate and reasonable financial plan. ...

...the onus is upon the plaintiff to show that an order for the periodic payment of the judgement would not be in his best interests.

If the Court is to allow a lump-sum payment of the judgement, it must be on the basis of a clear expectation that there is a reasonable plan involving tolerable risk for deployment of the funds and that the plan would most likely be implemented and maintained.

The advantages of periodic payment of judgements or portions of judgements, structured through the purchase of annuities, is the certainty and guarantee of performance. This aspect assumes greater importance as the time period over which the funds will be required increases. This form of periodic payment fully accounts for life expectancy and can be modelled to account for inflation over the payment period.

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[4] (1998), 55 B.C.L.R. (3d) 150 (B.C.S.C.).

[5] (2001), 91 B.C.L.R. (3d) 137 (B.C.S.C.).

[6] Note 5, above, at 142.

[7] Note 5, above, at 144-145.

Certainty and guarantee have a price. A privately invested fund, with some equity component, would likely provide a higher rate of return on investment. The higher return would be modified by the application of management fees and provision for income tax. The return taking all factors into account might well remain higher.

The defendants calculate the return on investment on the periodic annuity payments proposed here to be in the range of 5.5%. The rate of return suggested by the plaintiff if invested in a privately managed "balanced portfolio" are suggested to be in the range of 8%.

The plaintiff is a young man with a normal life expectancy. The investment horizon is so far into the future that higher rates of return are more difficult to predict and the tendency is to return over the long range to lower historical norms.

A guarantee period for the annuity payment may be structured so as to guarantee an estate provision if desirable. A privately managed investment however might well maintain the core capital, which apart from a guaranteed payout is consumed on the initial annuity purchase.

The annuity structure removes investment risk, management expense, and provides an income tax free stream of income.

Periodic lump-sum provisions may be incorporated if needed or considered desirable. A similar provision by reduction of capital could also be arranged in a privately managed fund.

I am not persuaded that periodic payment of a portion of a balance of the remaining judgement would be against the plaintiff's best interest. It must be borne in mind that the plaintiff has already had approximately one half of his judgement funded and that what is now proposed would see only approximately one half of the remaining balance subject to periodic payment with the balance paid out as lump-sum. It is therefore only about 25% of the total judgement in this case, and less than one half of the pecuniary damages awarded that is now realistically available to structure as periodic payments.

I am satisfied on the evidence that it is in the best interests of the plaintiff to have the certainty and lifetime guarantee of at least his future cost of medications and medical care, sometimes referred to as "medicine money", with some contribution toward basic living expense acting as a supplement to residual earning capacity.

I do not have confidence that if the unpaid judgement funds were paid as a lump-sum to the plaintiff he would adhere to the disciplined investment and conservation regime over his lifetime that would be necessary to adequately protect his future care needs."

In the case of ***Drews* v. *Savard***[8], Justice Morrison of the British Columbia Supreme Court found that a combination of a lump-sum and a partial structured settlement was in the best interests of the plaintiff who had argued that a structured settlement was not in her best interests.

[8] [2002] B.C.J. No. 956 (Q.L.) (B.C.S.C.).

Justice Morrison set out the advantages of a structured settlement, as summarized by material filed with the Court, as follows:[9]

> *"The structured settlement payments represent principal and interest. The entire payment including principal and interest is tax free. A structure provides a guaranteed monthly income. The capital invested in the structured settlement is creditor-proof. The annuity provides for indexing. The annuity has a minimum guarantee period in the event of premature death. Not only is the annuity provided by a major life insurance company, it is contingently guaranteed by the Insurance Corporation of British Columbia."*

The Court went on to find that:[10]

> *"The legislation mandating structured settlements, provided such a settlement is in the interest of the plaintiff, is fairly recent. It is legislation that has a lot of common sense, and there will always be exceptions where it should not be ordered. However, in this case I believe it is in the best interests of the plaintiff to have a partial structured settlement, and there can be considerable flexibility built into a settlement that is structured for this particular plaintiff. The plaintiff here has not put forward any plan, nor has Mr. Cartwright on her behalf.*
>
> *Accordingly, the defence application that the awards for future wage loss and loss of opportunity be paid periodically, pursuant to s. 55 of the Act is awarded. However, the award for future care costs of $129,000 will be paid directly to the plaintiff, and that amount will be increased by an amount that offsets liability for income tax, pursuant to s. 55(3) of the Act. I believe that it is in the area of future care and special damages where the plaintiff may well need flexibility to meet unexpected expenses as they occur. In my view, it would not be in the best interests of the plaintiff to order that amount of $129,000 be included in the structured settlement."*

In the case of ***Lee*** **v.** ***Dawson***, the Court found that notwithstanding the plaintiff had suffered from a traumatic brain injury with resulting stunted psychological growth, it was unlikely that he would end up being a burden to society. There was evidence that he would want and need remedial surgery for a disfigured face. The plaintiff opposed receiving his damages award in the form of a structured settlement. The Court discussed the strengths and weaknesses of the proposed structured settlement and found that:[11]

> *"The weaknesses in the circumstances in this case, are that the structured settlement is locked in and the monthly payments, apart from indexing, cannot be changed. That means that if a large sum of money is*

[9] Note 8, above, at para. 22.

[10] Note 8, above, at paras. 23-24.

[11] (2003), 17 B.C.L.R. (4th) 80 at 87 (B.C.S.C.).

> *needed for an operation, the plaintiff will have to have saved the money from the stream of payments. There is no flexibility in that regard.*
>
> *The plaintiff has satisfied me that a structured settlement is not in his best interests, and I decline to make such an order."*

In summary, the British Columbia Courts appear to give substantial expression to the concept of 'best interests of the plaintiff' in reaching a decision as to whether or not a structured settlement will be awarded. At the same time the Courts appear to give appropriate consideration to the public policy behind s. 55 by carefully considering age, capabilities and other factors which may affect the plaintiff's ability to manage and preserve a large lump-sum award.

Ontario

In Ontario the Courts are provided with the jurisdiction to order a structured settlement under the provisions of s.116 of the *Courts of Justice Act*.[12] This jurisdiction applies to any proceeding where damages are claimed for personal injuries or under Part V of the *Family Law Act* for loss resulting from the injury to or death of a person.

The Court *may* make such an order to pay all or part of the damages periodically on such terms as the Court considers just if all the affected parties consent. However, if the plaintiff requests an income tax gross-up on the award, the Court *shall* order that all or part of the award be paid periodically on such terms as the Court considers just. The Court is, however, expressly prohibited from making any such order if the parties otherwise consent or if the Court is of the opinion that the order would not be in the best interests of the plaintiff having regard to all the circumstances of the case.

Section 116 directs the Court to take into account the following factors when considering the best interests of the plaintiff: a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments; b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; c) whether a scheme of periodic payments is practical having regard to all the circumstances of the case.

It is to be noted that the Ontario legislation, unlike that in other Canadian jurisdictions, provides that: "*The Court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the Court considers just.*"[13]

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[12] R.S.O. 1990, c. C.43; See: Appendix "B"

[13] Note 12, above, s. 116 (4).

In interpreting s. 116, the Ontario Court of Appeal in ***Wilson*** **v.** ***Martinello***[14] held that if the plaintiff requests an income tax gross-up, a structured settlement is mandatory unless the plaintiff can satisfy the Court that the one proposed by the defendant is not in the plaintiff's best interests. The Court of Appeal went on to agree with the trial judge's finding that periodic payments would not be in the best interests of the plaintiff. The Court stated:[15] "*This is not the usual case which calls for a structured award. We are dealing here with a husband who has lost his wife and one of his daughters. They were killed outright. There is no ongoing obligation on his part to provide them with future medical and financial care. A structure is not required to provide the victims of this accident with a source of income for the rest of their lives that would ensure that their needs are met, regardless of what the plaintiff husband does. The two victims will never be a charge on society.*"

In the Ontario case of ***Valliant*** **v.** ***Powell***, the Court of Justice found in favour of a structured settlement for future cost of care. Justice Karam stated that the Court is required to "*consider the best interests of the plaintiffs in the particular circumstances of each of these cases. In that respect, I am satisfied that both plaintiffs fit the very epitome of the best case scenario for the use of a structured settlement. In fact, it is noteworthy that in* ***Wilson****, the Court, in supporting the trial judge's position, and rejecting a structure, referred to a number of factors, to be considered, including the ongoing necessity for future medical and financial care, a dependancy on a future source of income for the remainder of their lives in order to meet their needs, and the possibility that the victims might ultimately be a charge on society. In addition, we are faced with two plaintiffs, who not only will require medical and financial care for the rest of their lives but, clearly, will never be able to provide for themselves on a day-to-day basis or to make decisions for their own well being or to be gainfully employed. As Justice Dickson pointed out in* ***Andrews****, when referring to the disadvantage of lump-sum payments: 'The difficulties are greatest where there is a continuing need for intensive and expensive care and a long term loss of earning capacity'.*

For these reasons, I will order that the full amount of the award for future care in the cases of each of these two plaintiffs be structured in accordance with the example of the consumer price indexed structure submitted by the defendant."[16]

It is to be noted that in respect of the concern raised by the plaintiffs that a structure was not liquid and therefore could not respond to future unexpected contingencies the Court stated, "*[a]ssuming the existence of a very valuable and important new treatment, or similar opportunity, which would be of great benefit to the plaintiffs, I take solace in the fact that the substantial amount of money awarded for their respective losses of future income and general damages remain available for such an emergency.*"[17]

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[14](1995), 23 O.R. (3d) 417 (Ont. C.A.).

[15] Note 14, above, at 430-431.

[16] [1996] O.J. no 5100 (Q.L.) at para. 18-19 (Ont. C.J., Gen. Div.).

[17] Note 16, above, at para. 15.

In ***Peddle (Litigation guardian of)* v. *Ontario (Minister of Transportation)***, Justice Jenkins of the Ontario Court of Justice concluded that the plaintiff "*because of his cognitive disabilities caused by this accident may have difficulty managing the lump-sum award even if it is professionally managed.*"[18] The Court ordered a structured settlement for the future care costs.

In **Roberts v. *Morana***, upheld on appeal, the Court ordered a structured settlement for the plaintiff's future care costs in the amount of 3.8 million dollars as being in the plaintiff's best interests. The Court found that "*the payment of the balance of the judgement by way of lump-sum payment gives needed financial flexibility to this settlement.*"[19]

In other recent Ontario decisions it is apparent that the Courts are prepared to give serious and careful consideration to the best interests of plaintiffs and not easily override a plaintiff's own interpretation of what constitutes his or her best interests.[20]

Manitoba

In Manitoba, s.88.2 of the *Court of Queen's Bench Act*[21] provides that "*[i]n a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under The Fatal Accidents Act, the Court may, on the application of any party, order that damages be paid in whole or in part by periodic payments.*

The Manitoba legislation does not provide any guidelines or criteria with respect to the circumstances that might inform the exercise of the Court's jurisdiction to order structured settlements. It is this Manitoba legislation on which the Nova Scotia Barristers' Society Administration of Justice Committee modelled its proposed draft legislation and which is the model for the current Nova Scotia legislation.

In the leading Manitoba case dealing with this legislation, ***Lusignan* v. *Concordia Hospital***, the Court ordered periodic payments for future care. In that case the plaintiff had suffered, at the time of birth, a catastrophic brain injury which had left her severely mentally handicapped and retarded. At the time of trial the plaintiff was still a minor. The plaintiff was opposed to periodic payments. Justice Jewers held:[22]

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[18] [1997] O.J. No. 2380 at para. 14 (Ont. C.J., Gen. Div.).

[19] (1998), 37 O.R. (3d) 333 at 356 (Ont. C.J., Gen. Div.).

[20] See, for example, *Chesher* v. *Monaghan* (2000), 48 O.R. (3d) 451 (Ont. C.A.), leave to appeal refused by the Supreme Court of Canada, (2001), 186 D.L.R. (4th) 595, *Creasor* v. *Cadillac Fairview Corporation*, [2000] O.J. No. 2681(Q.L.) (Ont. Sup. C.J.) ; and *Bishop* v. *Pinto*, [2002] O.J. No. 1866 (Q.L.) (Ont. Sup. Ct. J.).

[21] S.M. 1988-89, c. 4; See: Appendix "C".

[22] (1997), 117 Man. R. (2d) 241 at 261 (Q.B.).

> *"I can see no reason in principle why periodic payments should not be ordered. The advantages to the plaintiffs of periodic payments of future care would be: 1) the payments would continue for the entire life of Angela and there would be no danger of under-compensation in the event that she outlived her expected life span; 2) the payments would be tax free; 3) there would be a lessened need (and expense) for investment fees.*
>
> *The advantages to the defendants would be: 1) they would save the cost of the income tax gross-up; 2) they would save the expense of the higher cost of investment counselling; 3) the premium for the annuity might be significantly less than the amount of the lump-sum assessed in these reasons.*
>
> *There would be the proverbial 'win/win' situation whereby the plaintiffs would be adequately compensated at a considerable savings to the defendants."*

The plaintiffs had expressed concern about, amongst other things, inflation and liquidity. The Court found however that "*[a]s counsel for the defendant submits, the plaintiffs will, or should have, a large sum available produced by the award of general damages which can be used for possible increased or unexpected expenses.*"[23]

IV. STRUCTURED SETTLEMENT ORDER: RELEVANT CONSIDERATIONS

Since work began on this project, the Nova Scotia *Judicature Act* has been amended so as to provide the Courts with the discretion to order a structured settlement in whole or in part.

HOW THE COURTS HAVE ACTED:

The respective provincial enabling legislation in other jurisdictions has not, to date, generated a great deal of case law. A review of the reported case law in those jurisdictions would suggest, however, that generally courts are cautious about *imposing* an order. In Ontario, for example, considerable deference is given to a plaintiff's own assessment of what is in his or her best interests.

A review of reported case law in other jurisdictions clearly indicates that courts are deferential to the wishes of plaintiffs.

The case law also indicates that the Courts consider that a structured settlement *may* be appropriate in the following circumstances, namely:

1) when consented to by the parties;
2) when the plaintiff is a minor or incompetent; and
3) when a tax gross up for long term care is requested.

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[23] Note 22, above, at 262.

Even in these circumstances, the Courts in other Canadian jurisdictions provide a plaintiff with a full opportunity to show why such a court-ordered structured settlement would not be in his or her best interests. A plaintiff's own interpretation of that best interest is to be accorded great deference.

LIST OF APPENDICES:

A. British Columbia, *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 55
B. Ontario, *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 116
C. Manitoba, *Court of Queen's Bench Act*, S.M. 1988-89, c.4, ss. 88.1-88.9
D. Nova Scotia, *Automobile Insurance Reform Act*, S.N.S. 2003 (2d Sess.), c. 1, s. 26

APPENDIX "A"

British Columbia, *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 55

Structured judgments

55 (1) The court must order that an award for pecuniary damages in a motor vehicle action be paid periodically, on the terms the court considers just,

(a) if the award for pecuniary damages is, after section 25 has been applied, at least $100 000 and the court considers it to be in the best interests of the plaintiff, or

(b) if

(i) the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award, and

(ii) the court considers that the order, that the award be paid periodically, is not contrary to the best interests of the plaintiff.

(2) Despite subsection (1), the court must not make an order under this section

(a) if one or more of the parties in respect of whom the order would be made satisfies the court that those parties do not have sufficient means to fund the order, or

(b) if the court is satisfied that an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery for damages arising out of the accident.

(3) If the court does not make an order for periodic payments under this section, it may make an award for damages that includes an amount to offset liability for income tax on income from investment of the award.

APPENDIX "B"

Ontario, *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 116

Periodic payment and review of damages

116. (1) In a proceeding where damages are claimed for personal injuries or under Part V of the *Family Law Act* for loss resulting from the injury to or death of a person, the court,

(a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just. R.S.O. 1990, c. C.43, s. 116 (1); 1996, c. 25, s. 1 (20).

No order

(2) An order under clause (1) (b) shall not be made if the parties otherwise consent or if the court is of the opinion that the order would not be in the best interests of the plaintiff, having regard to all the circumstances of the case.

Best interests

(3) In considering the best interests of the plaintiff, the court shall take into account,

(a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments;

(b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; and

(c) whether a scheme of periodic payments is practicable having regard to all the circumstances of the case.

Future review

(4) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

Amount to offset liability for income tax

(5) If the court does not make an order for periodic payment under subsection (1), it shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award. R.S.O. 1990, c. C.43, s. 116 (2-5).

APPENDIX "C"

Manitoba, *Court of Queen's Bench Act*, S.M. 1988-89, c.4, ss. 88.1-88.9

PART XIV.1

PERIODIC PAYMENT OF DAMAGES

Definitions

88.1 In this Part,

"**judgment creditor**" means a person who is entitled to receive payment of or to enforce a judgment; («««««« créancier judiciaire »»»»»»)

"**judgment debtor**" means a person who is obligated to make payment under a judgment or against whom a judgment may be enforced; («««««« débiteur judiciaire »»»»»»)

"**periodic payments**" means the payment of money to a judgment creditor at a future time or times in an amount or amounts that are ordered by the court. («««««« versements périodiques »»»»»»)

S.M. 1993, c. 19, s. 6.

Order for periodic payments

88.2 In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under *The Fatal Accidents Act*, the court may, on the application of any party, order that damages be paid in whole or in part by periodic payments.

S.M. 1993, c. 19, s. 6.

Content of judgment

88.3 Where the court orders damages to be paid by periodic payments, the judgment shall

(a) identify each head of damage for which a periodic award is to be made;

(b) in respect of each head of damage for which periodic payments are awarded, state

(i) the amount of each periodic payment,

(ii) the date of or the interval between each periodic payment,

(iii) the recipient of each periodic payment,

(iv) any annual percentage increase in the amount of each periodic payment, and

(v) the date or event on which the periodic payments will terminate; and

(c) contain or have attached to it any other material that the court considers appropriate.

S.M. 1993, c. 19, s. 6.

Security required

88.4(1) Unless the court orders otherwise, a judgment that orders damages to be paid by periodic payments is conditional on the judgment debtor's filing with the court, within 30 days after the day the judgment is rendered or such other time as the court may fix, security to assure the payment of the judgment.

Security to be satisfactory to court

88.4(2) Security under subsection (1) shall be in the form of an annuity contract issued by a life insurer satisfactory to the court, or in any other form that is satisfactory to the court.

Effect of posting security

88.4(3) Where security is filed and approved under this section, the judgment debtor by whom or on whose behalf the security is filed is discharged from all liability to the judgment creditor in respect of the damages that are to be paid by periodic payments.

Effect of not posting security

88.4(4) Where security is not filed and approved under this section, the court shall, at the request of any party to the proceedings, vacate the portions of the judgment in which periodic payments are awarded and substitute a lump sum award or awards.

S.M. 1993, c. 19, s. 6.

Effect of death

88.5 Where a judgment creditor dies before the date or event on which periodic payments are terminated for a head of damage under subclause 88.3(b)(v), the remaining periodic payments for that head of damage shall continue to be paid to the estate of the judgment creditor until the termination date, unless the judgment provides otherwise.

S.M. 1993, c. 19, s. 6.

Commutation to lump sum prohibited

88.6 Except as provided in subsection 88.4(4), no award for periodic payments of damages shall be commuted into a lump sum.

S.M. 1993, c. 19, s. 6.

Limitation on garnishment, etc.

88.7 Periodic payments of damages for loss of future earnings are exempt from garnishment, attachment, execution or any other process or claim to the same extent that wages or earnings are exempt under law.

S.M. 1993, c. 19, s. 6.

Assignment of periodic payments

88.8 An assignment or an agreement to assign periodic payments that are identified in a judgment as being for the cost of future care is void and unenforceable unless

(a) the assignee is a provider of care to the judgment creditor and the assignment is in respect of the cost of products, services or accommodation provided by the assignee; and

(b) the assignment or agreement to assign is approved by the court.

S.M. 1993, c. 19, s. 6.

Transitional

88.9 This Part applies to all proceedings, whether commenced before or after the day this Part comes into force.

S.M. 1993, c. 19, s. 6.

APPENDIX "D"

Nova Scotia, *Automobile Insurance Reform Act*, S.N.S. 2003 (2d Sess.), c. 1, s. 26.4.

PART II

JUDICATURE ACT

26 Chapter 240 of the Revised Statutes, 1989, the *Judicature Act*, is amended by adding immediately after Section 35 the following Sections:

35A In Sections 35B to 35H,

(a) "judgment creditor" means a person who is entitled to receive payment of or to enforce a judgment;

(b) "judgment debtor" means an person who is obligated to make payment under a judgment or against whom a judgment may be enforced;

(c) "periodic payments" means the payment of money to a judgment creditor at a future time or times.

35B In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under the *Fatal Injuries Act*, the court may, on the application of any party, order that the future pecuniary damages and such other damages as the parties may agree be paid in whole or in part by periodic payments.

35C Where the court orders damages to be paid by periodic payments, the judgment shall

(a) identify each head of damage for which a periodic payment is to be made;

(b) in respect of each head of damage for which periodic payments are awarded, state

(i) the amount of each periodic payment,

(ii) the date of or the interval between each periodic payment,

(iii) the recipient of each periodic payment,

(iv) any annual percentage increase in the amount of each periodic payment, and

(v) the date or event on which the periodic payments will terminate;

and

(c) contain or have attached to it any other material that the court considers appropriate.

35D (1) Unless the court orders otherwise, a judgment that orders damages to be paid by

periodic payments is conditional on the judgment debtor's filing with the court, within thirty days after the day the judgment is rendered or such other time as the court may fix, security to assure the payment of the judgment.

(2) Security under subsection (1) shall be in the form of an annuity contract issued by a life insurer satisfactory to the court, or in any other form that is satisfactory to the court.

(3) Where security is filed and approved under this Section, the judgment debtor by whom or on whose behalf the security is filed is discharged from all liability to the judgment creditor in respect of the damages that are to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid.

35E Where a judgment creditor dies before the date or event on which periodic payments are terminated for a head of damage under subclause (v) of clause (b) of Section 35C, the remaining periodic payments for that head of damage shall continue to be paid to the estate of the judgment creditor until the termination date, unless the judgment provides otherwise.

35F Except as provided in subsection (2) of Section 35D and Section 35E, no award for periodic payments of damages shall be commuted into a lump sum.

35G Periodic payments of damages for loss of future earnings are exempt from garnishment, attachment, execution or any other process or claim to the same extent that wages or earnings are exempt under law.

35H An award for periodic payments is not assignable or transferable.

35I Sections 35A to 35H apply to all proceedings, whether commenced before or after the coming into force of those Sections.